RECORD AND BRIEFS

Supreme Court, U.S.
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No. 16-1348

IN THE

Supreme Court of the United States

MICHAEL N. CURRIER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Commonwealth acknowledges that state courts of last resort and federal courts of appeals "have reached different conclusions" over whether a defendant who consents to severance of multiple charges loses his right under the Double Jeopardy Clause to the preclusive effect of an acquittal. BIO 18, 21, 25. And the Commonwealth does not dispute that the issue is a recurring one that has important implications for the criminal justice system. Pet. 12-14; *see also* Amicus Br. of NACDL at 1 (issue is one of "critical importance"). The Commonwealth argues, however, that certiorari should be denied because "further percolation" would be useful, this case is a poor vehicle for deciding the issue, and the Virginia Supreme Court's decision is correct.

None of these arguments withstands scrutiny. The split of authority is well developed and ripe for resolution. This case is an ideal vehicle for resolving the conflict. And the Virginia Supreme Court's holding improperly strips criminal defendants of one of the Constitution's most vital safeguards. This Court should grant certiorari.

I. The split of authority over the question presented is well developed and mature.

While recognizing a "split of authority" on the question presented, BIO 24, the Commonwealth advances two arguments as to why that split does not warrant this Court's review. First, the Commonwealth calls for further percolation on the ground that courts that disagree with the Virginia Supreme Court have employed "flawed" reasoning. *Id.* 21. Second, the Commonwealth contends that two other decisions that

the Virginia Court of Appeals grouped into the conflict do not really establish binding precedent on the issue. *Id.* 19-22. Both of these arguments are misguided.

1. The Commonwealth acknowledges that three courts of last resort disagree with how the Virginia Supreme Court and two federal courts of appeals have resolved the question presented. BIO 21, 25. Specifically, the high courts of Iowa, Florida, and the District of Columbia have all held that neither *Jeffers v. United States*, 432 U.S. 137 (1977), nor *Ohio v. Johnson*, 467 U.S. 493 (1984), prevents a defendant who consented to severance from invoking the issue preclusion component of the Double Jeopardy Clause. *See Joya v. United States*, 53 A.3d 309, 316-19 (D.C. 2012); *State v. Butler*, 505 N.W.2d 806, 809-10 (Iowa 1993); *Gragg v. State*, 429 So. 2d 1204, 1206-08 (Fla. 1983), *cert. denied*, 464 U.S. 820 (1983).

That the Commonwealth and other courts believe this interpretation of this Court's precedent to be "flawed" is reason to *grant* certiorari, not deny it. Take, for example, the decision in *Butler*. The Commonwealth pronounces that decision "internally inconsistent" because the Iowa Supreme Court concluded that a defendant who agrees to severance waives his double jeopardy right against successive trials but retains his right to the preclusive effect of an acquittal. BIO 23-24. But that court's differentiation between those two forms of double jeopardy protection actually goes to the heart of the issue here. According to the Iowa Supreme Court (and petitioner), issue preclusion "is an entirely separate claim" from an attempt to avoid multiple trials and "mandates a separate analysis"—one that ultimately forecloses waiver in this situation. *Butler*, 505 N.W.2d

at 808-09; *see also* Pet. 17-20. The Commonwealth, on the other hand, insists that "the same waiver analysis should apply to both claims." BIO 24. Only this Court can resolve who has the better reading of this Court's case law.

The Commonwealth also asserts that the D.C. Court of Appeals' double jeopardy analysis in *Joya* should be discounted because the court "did not find the second trial barred." BIO 22. The court, however, engaged in a detailed analysis of the double jeopardy issue and held that "the government [was] estopped" at the second trial from seeking to prove the factual allegations the jury in the first trial necessarily rejected. *Joya*, 53 A.3d at 321. This analysis and conferral of constitutional relief directly contravenes the Virginia Supreme Court's decision here. It also confirms that the disagreement over how to interpret *Jeffers* and *Johnson* has been fully ventilated and is ripe for resolution.

2. Even if the split of authority were—as the Commonwealth maintains—only three-to-three, that would be more than sufficient to warrant this Court's intervention. But the conflict in reality is four-to-four.

The Commonwealth asserts that the First Circuit's decision in *United States v. Aguilar-Aranceta*, 957 F.2d 18 (1st Cir. 1992), *cert. denied*, 506 U.S. 834 (1992), "did not address" the question presented. BIO 21. It is true that *Aguilar-Aranceta* did not deal directly with severance. But the First Circuit squarely held that the "collateral estoppel effect" of an acquittal is "separate from" the question whether consenting to a subsequent trial "waive[s]" the protection against multiple prosecutions for the same offense. 957 F.2d at 22-23. The First Circuit also

concluded that a "defendant's consent" to a second trial does *not* waive the former protection. *Id.* As several courts in the conflict have recognized, this analysis and holding necessarily mean that defendants in the First Circuit retain their right to the issue-preclusive effect of an acquittal even if they consent to severance. *See* Pet. App. 11a n.2; *Joya*, 53 A.3d at 319 & n.20; *Butler*, 505 N.W.2d at 810.

The Commonwealth also incorrectly dismisses the discussion in *State v. Chenique-Puey*, 678 A.2d 694 (N.J. 1996), of the double jeopardy question presented as "dicta," BIO 19. The New Jersey Supreme Court required the charges in that case to be severed in part because it believed that a defendant who consents to severance is "precluded from then asserting double jeopardy or collateral estoppel bars to the subsequent prosecution." *Chenique-Puey*, 678 A.2d at 698 (citing *Jeffers*). This portion of the opinion thus constitutes part of the case's holding, not mere dicta. *See, e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

II. This case presents an ideal vehicle for resolving the conflict.

The Commonwealth argues this case is an unsuitable vehicle for resolving the conflict over the question presented because (1) "this Court must resolve in the first instance whether an issue of ultimate fact was necessarily determined at Currier's first trial that would bar his second trial" and (2) petitioner cannot make such a showing. BIO 11-12. Neither contention is correct.

1. The Commonwealth is doubly wrong in asserting that granting certiorari would require this Court determine whether the Double Jeopardy Clause precludes trying petitioner on the felon-in-possession charge.

First, there is no reason why this Court would need to apply the issue-preclusion test to the facts here. To the contrary, this Court's customary practice is to decide whether a constitutional protection applies and, if so, to remand to allow lower courts to apply those protections in the first instance. *See, e.g.*, *Manuel v. City of Joliet*, 137 S. Ct. 911, 922 (2017); *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869-71 (2017). This Court did exactly that in *Yeager v. United States*, 557 U.S. 110 (2009). It held that the Double Jeopardy Clause entitled the defendant to assert issue preclusion and remanded for the lower courts to decide the "factual dispute" regarding which charges (if any) the jury's acquittal precluded the Government from pursuing further. *Id.* at 125-26.

The Court could—and should—follow that same course here. As lower courts have recognized, the question whether the issue-preclusion doctrine applies is logically antecedent to whether any particular defendant is entitled to relief on the facts. *See, e.g.*, *Joya*, 53 A.3d at 316 (waiver question should be addressed "before" factual issues); *Commonwealth v. Wallace*, 602 A.2d 345, 347-50 (Pa. Super. 1992) (following same progression). This Court need not detain itself with the latter issue.

Second, even as to the factual component of petitioner's double jeopardy claim, the Commonwealth improperly conflates the issue whether petitioner's conviction should be reversed with whether the

Double Jeopardy Clause ultimately "bars" a new trial. *See Joya*, 53 A.3d at 321 (distinguishing one from the other). To obtain "meaningful" relief on appeal (*see* BIO 8), petitioner does not need to show that the Double Jeopardy Clause forecloses a trial on the felon-in-possession charge. He needs to show only that the trial that produced his conviction failed to respect the preclusive effect of his acquittal at the first trial. Under the issue-preclusion doctrine, a conviction must be reversed, regardless of the permissibility of a new trial, whenever the prosecution "relitigat[ed] any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager*, 557 U.S. at 119.

Here, the prosecution did just that. The jury at petitioner's first trial determined, at the very least, that petitioner did not participate in the home-break-in and theft of the safe. Yet at the second trial, the Commonwealth again sought to prove—primarily through the testimony of Bradley Wood—that petitioner participated in those very actions. *See, e.g.*, Jt. App. 403-07 (Wood's testimony: "Me and Mr. Currier . . . went into the house," "loaded the safe up and took the safe away"); *id.* 450 (closing argument: petitioner "engaged in these acts" with Wood). Even now, the Commonwealth insists that "Currier and Bradley Wood broke into the home of Paul and Brenda Garrison and stole [the] safe." BIO 1. The Commonwealth has taken this position because the safe was so heavy that it could not "be moved [by] one person." Jt. App. 455. Thus, as the Commonwealth explained to the trial judge, "[i]t's impossible for the jury to understand how we get a safe in the river without the—and how we connect Mr. Currier to the safe in the river without that prior, that prior involvement there in the house." *Id.* 313.

In light of this evidence and argumentation in petitioner's second prosecution, it does not matter whether—as the Commonwealth now maintains, *see* BIO 10-11—the jury at the first trial could rationally have concluded that petitioner waited in the truck while Wood and some other, unnamed accomplice removed the safe from the Garrison residence. The Commonwealth did not advance any such theory at the second trial. Rather, it sought to demonstrate exactly what it failed to prove in the first trial—namely, that petitioner acted in complete concert with Wood. If petitioner is entitled to the preclusive effect of the first jury's finding that he did *not* steal the safe with Wood, then his conviction from the second trial must be reversed.

2. Even if there were reason to assess not just whether petitioner's conviction should be reversed but whether the Double Jeopardy Clause bars a new trial altogether, petitioner will almost certainly be able to make that showing on remand. The Commonwealth has never argued that anyone besides Wood and petitioner participated in the crimes. Nor has it ever presented any theory why petitioner would have waited in Wood's truck while Wood and someone else stole the safe. To the contrary, as the trial court put it, the Commonwealth's allegation regarding "the guns being accessed by Mr. Currier" has always depended upon its proving "the larceny charge." Jt. App. 488. "[T]he connection between the larceny, the guns, and the safe act as one final essential element." *Id.*

It would be quite an abrupt shift for the Commonwealth to change course now—particularly when any new factual theory would contradict the story of its central witness, Mr. Wood. And it is hard

to believe the state courts would allow such a shift, even if the Commonwealth attempted it.

III. The Virginia Supreme Court's decision is incorrect.

The depth of conflicting authority here, along with the importance of the question presented, calls for this Court's intervention regardless of whether the Virginia Supreme Court reached the correct result. That said, the Commonwealth's arguments on the merits only confirm the need for review.

The Commonwealth does not seriously dispute that the Double Jeopardy Clause's bar against relitigating issues decided against the prosecution applies "irrespective of the good faith of the State in bringing successive prosecutions." *Harris v. Washington*, 404 U.S. 55, 56-57 (1971) (per curiam). Nor could it. This Court has held that issue preclusion applies where state law requires severance of the charges, *see Turner v. Arkansas*, 407 U.S. 366, 367, 370 (1972) (per curiam), and where a hung jury thwarts the prosecution's attempt to litigate all charges in a single proceeding, *see Yeager*, 557 U.S. 118-19. No prosecutorial bad faith is present in either instance. So it is likewise irrelevant whether "prosecutorial overreaching" occurred here.

That leaves the Commonwealth's contention that a defendant nevertheless "waives" his right to the preclusive effect of an acquittal whenever, as here, he agrees to severance. BIO 25-29. It is true that a defendant waives (more accurately, forfeits) a constitutional right when he takes an action that is incompatible with that right. *See* Pet. 17-18. *Jeffers* and *Johnson* apply this general principle to the double jeopardy protection against successive prosecutions: If

a defendant seeks severance, he loses the right to complain about the fact of a second trial. *See Jeffers*, 432 U.S. at 142, 153-54; *Johnson*, 467 U.S. at 502; *see also United States v. Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion) (same when defendant seeks a mistrial).

The Commonwealth, however, ignores that this case does not involve the protection against successive prosecutions. Instead, as the Petition stresses, this case involves the distinct protection against relitigating issues previously decided against the prosecution. *See* Pet. 18-19. And there is nothing logically inconsistent in agreeing to severance and still insisting upon the preclusive effect of an acquittal. *Id.* That being so, there can be no waiver here.

Even if the waiver analysis here permitted some balancing of the equities, the outcome could be no different. All agree that petitioner could not have objected to severance without suffering "the undue prejudice that would occur upon mention of [petitioner's] felonious past to a jury." Pet. App. 9a; *see also Michelson v. United States*, 335 U.S. 469, 475-76 (1948). The Commonwealth counters that applying issue preclusion in this context would "deprive [it] of its one fair opportunity" to prove all of its allegations. BIO 26. But as petitioner has explained, the issue-preclusion doctrine operates only after the prosecution has had an opportunity to prove an allegation and failed to do so. *See* Pet. 21-22. And even then, the prosecution remains free to pursue remaining charges on any theory (supported by sufficient evidence) that it has not already litigated and lost. *See, e.g.*, *Joya*, 53 A.3d at 321-23. The equities, therefore, do not reasonably allow any finding of waiver.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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